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JUDGE WILLIAMS

8 UNITED STATES BANKRUPTCY COURT
9 EASTERN DISTRICT OF WASHINGTON

10 THE CATHOLIC BISHOP OF
11 SPOKANE a/k/a THE CATHOLIC
12 DIOCESE OF SPOKANE,

Debtor.

NO. 04-08822-PCW11
Chapter 11

13 COMMITTEE OF TORT LITIGANTS,

14 Plaintiff,

Adversary No. 05-80038-PCW

15 Vs.

16 THE CATHOLIC DIOCESE OF
17 SPOKANE, et al.,

Defendants.

SACRED HEART - SPOKANE - PARISH'S
OPPOSITION TO
SUMMARY JUDGMENT

18
19 Sacred Heart – Spokane and its Parishioners (“Sacred Heart”), in opposition to the
20 Tort Litigant Committee's (the “Committee”) Motion for Summary Judgment (Docket Nos.
21 63-67, 72), submits the following memorandum of law. This memorandum incorporates and
22 is supported by the Affidavit of the Reverend Mark Pautler, the Affidavit of Robert Lamp,
23 Parishioner, and Defendants’ Omnibus Statement of Facts (LR 7056). Sacred Heart also
24 adopts and incorporates those Affidavits filed by other Defendants opposing Plaintiff’s
25 Motion.
26

SACRED HEART - SPOKANE - PARISH'S OPPOSITION
TO SUMMARY JUDGMENT - 1

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I.

RELIEF REQUESTED

The Committee's attempt to deny Sacred Heart its ownership interest in real property that Sacred Heart paid for, improved, and uses in fulfillment of its religious tenets must be rejected. The undisputed evidence demonstrates that:

1. Neither the Committee, its members, nor the Debtor have any beneficial interest in the real property belonging to Sacred Heart;

2. Neither the Committee, its members, nor the Debtor have a legal basis to justify the taking of real property from Sacred Heart, a non-debtor; and

3. Sacred Heart' equitable and beneficial ownership interest in the real property is clearly established by non-bankruptcy law.

As a matter of both law and fact, the Committee's Motion for Summary Judgment/Declaratory Relief seeking to deprive Sacred Heart of fundamental property rights and religious freedoms must be denied.

II.

PROCEDURAL HISTORY

A. The Bankruptcy

A voluntary petition under Chapter 11 of the Bankruptcy Code was filed by the Catholic Diocese of Spokane, a corporation sole ("Debtor"), on December 6, 2004 (Petition Date). The Bankruptcy Court entered the Order for Relief, adjudicating the Diocese a Chapter 11 Debtor. Since that date, the Debtor has acted as the Debtor-in-Possession pursuant to 11 USC 1108. The Debtor duly filed and subsequently amended its Schedules and Statement of Financial Affairs. (See Main Case Docket Nos. 19, 41-42)

Within its Statement of Financial Affairs, the Debtor describes certain real property to which it holds "bare legal title." The Statement of Affairs explains that equitable/beneficial title to such real property is held by other entities, including Sacred Heart. This description is accurate concerning the true ownership of the real property and supported by both facts and applicable law. Neither the Debtor nor Sacred Heart disputes this particular trust relationship.

1 **B. Appointment of Creditors Committee**

2 On February 2, 2005, the Court entered an Order duly approving the appointment of
3 the Committee. (Main Case Docket No. 206) The Committee consists of individuals who
4 filed complaints against the Diocese in the Superior Court of the County of Spokane, State
5 of Washington. Neither the Committee nor its members have asserted a claim in State
6 Court against Sacred Heart or identified any legal relationship with Sacred Heart.

7 The legal standing of the Committee to seek declaratory relief against non-debtors in
8 this manner is disputed and the subject of a pending motion to dismiss. (See Section II.F.)

9 **C. The Adversary**

10 On February 4, 2005, the Committee filed a three count Complaint ("Complaint") in
11 this adversary proceeding ("Adversary Proceeding"), specifically:

- 12 • FIRST CAUSE OF ACTION
(Declaratory Relief: The Disputed Real Property)
- 13 • SECOND CAUSE OF ACTION
(Declaratory Relief: the Disputed Personal Property)
- 14 • THIRD CAUSE OF ACTION
(Declaratory relief: Substantive Consolidation)
15 (Docket No. 1, Complaint)
16
17

18 Although property is allegedly "disputed," the Committee does not have or assert a
19 legal claim to or legal interest in the real or personal property. (See Complaint, pp. 13-15.)

20 The relief sought by the Committee is drafted as equitable, although it is clearly of
21 the nature and effect of relief determining property rights of non-debtors. Specifically,

- 22 1. Declaring that the Disputed Real Property is property of the estate under 11
23 U.S.C. § 541(a)(1) as of December 6, 2004;
- 24 2. Declaring that the Disputed Personal Property is property of the estate under
25 11 U.S.C. § 541(a)(1) as of December 6, 2004;
- 26

1 3. Ordering the Debtor to amend its Amended Statement of Financial Affairs and
2 its Amended Schedules of Assets and Liabilities to reflect that the Disputed Real Property
3 and the Disputed Personal Property are all property of the estate;

4 4. Ordering substantive consolidation, nunc pro tunc, of the Debtor's bankruptcy
5 estate with the [Diocese-Related Entities] effective as of December 6, 2004.

6 (Adv Complaint, p. 15)

7 By way of the Complaint, the Committee seeks to determine the property rights and
8 interests of not only Sacred Heart, but of 82 non-debtors. The Complaint seeks to deprive
9 those non-debtors of their instrumentalities used in religious worship, faithful exercise of its
10 mission, activities, and ministries.

11 **D. Motion for Avoidance Powers**

12 On February 7, 2004, the Committee filed a motion in the main case seeking
13 avoidance powers. (Main Case Docket Nos. 223-224) The motion was heard on May 2,
14 2005. The court continued hearing on this matter for an indefinite period (approximately 5
15 to 6 months) with any counsel being able to renote this matter on 20 days notice.
(Main Case Docket No. 393)

16 **E. Motion for Summary Judgment**

17 The Committee filed the present motion for summary judgment ("Motion") on April
18 17, 2005. (Adv. Docket No. 63)

19 The Motion seeks specific relief defining title and ownership of at least 22 separate
20 parcels of real property which belong to at least 22 different and distinct Defendants.
21 Although the Committee's Motion indicates that they have restricted summary judgment to
22 their first cause of action, the Memorandum aggressively seeks a ruling on their third cause
23 of action by way of an "alter ego" argument.

24 The Committee's Motion attempts to "lump" Sacred Heart' real property with other
25 Defendants' real property interests, dealing with all parcels of property collectively,
26 including all improvements and fixtures. However, each parcel of real property is a
separate parcel of property, with separate and distinct ownership interest, and separate

1 factual circumstances surrounding each parcel's acquisition, improvement, maintenance,
2 and use. The committee's standardized factual scenario is inapplicable and not an
3 appropriate basis for declaratory relief against Sacred Heart.

4 **F. Motion to Dismiss Adversary Proceeding**

5 On May 2, 2005, the Parish Defendants filed a motion under FRBP 7012 seeking to
6 dismiss this Adversary Proceeding on the following grounds:

7 The Committee's Complaint should be dismissed on either of two (2)
8 separate grounds.

9 1. Nothing contained within the express language of Section
10 521(1) or 541(a) clearly, explicitly, or unambiguously confers standing to a
creditors committee to file suit against non-debtors to define a non-debtor's
property rights.

11 2. The Bankruptcy Court and Federal District Court lack subject
12 matter jurisdiction over the claims alleged in the Committee's Complaint
13 because there is no case or controversy between the Committee and the
Parishes within the meaning of the Declaratory Judgment Act and Article III of
the U.S. Constitution.

14 (Docket Nos. 99-100)

15 This motion is set to be heard on June 27, 2005.

16
17 **III.**

18 **NON-CORE PROCEEDING**

19 The Committee asserts in its Complaint that this is a "core proceeding" under 28
20 USC § 157(b) and 1334(b). The Parishes, based upon the declaratory nature of the relief
21 sought in the Complaint, deny that this is a core proceeding. This action exclusively seeks
22 declaratory relief against over 80 non-debtor defendants to determine the property rights of
23 separate legal entities. The Complaint does not present a federal question nor is there
diversity between the litigants.

24 The present adversary action has the effect of a defacto quiet title action as to non-
25 debtor defendants. As such, it could have easily been brought in state Superior Court
26 pursuant to RCW 7.28.010 et seq., regardless of whether the Debtor was in bankruptcy.

1 For purposes of this Adversary Proceeding, Sacred Heart does not consent to entry
2 of Findings of Fact and Conclusions of Law and does not waive defenses related to
3 Plaintiff's standing and failure to state a claim. (See Docket Nos. 88, 99-100.)

4 IV.

5 STATEMENT OF FACTS

6 Sacred Heart was established as a separate and independent Parish in 1911. (Aff.
7 M. Pautler ¶ 4, 9) Currently, Sacred Heart is a parish comprised of 660 member
8 households, or approximately 1,637 individuals. (Aff. M. Pautler, ¶ 5) Under Canon Law,
9 Sacred Heart is a separate and distinct legal entity known as a juridic person. [Canons
10 §113-115, §515] Under Civil Law, Sacred Heart is an unincorporated association.
11 (Committee's Statement of Undisputed Fact, No. 23) The property in issue in the
12 Committee's motion is owned by Sacred Heart and identified as: County Parcel No.
13 35203.3818 (Aff. M. Pautler ¶ 8) The property at issue belongs to Sacred Heart. (Aff. M.
14 Pautler ¶ 8)

15 Sacred Heart has held, used and maintained land, and made numerous
16 improvements on this land over the years. (Aff. M. Pautler ¶ 11; Aff. R. Lamp ¶ 6) The
17 money needed for these improvements was raised by parishioners from parishioners for
18 the sole benefit of Sacred Heart Parish. (Aff. M. Pautler ¶ 11; Aff. R. Lamp ¶ 6) Since its
19 establishment, the parish of Sacred Heart has been comprised of, built, improved and
20 maintained by gifts, donations and tithes of parishioners. (Aff. M. Pautler ¶ 6)

21 Over the years Sacred Heart has owned additional real property that it has since
22 sold. (Aff. M. Pautler ¶ 8) In 1965, real property owned by Sacred Heart was sold by
23 Sacred Heart to St. Luke's Hospital of Spokane. (Aff. M. Pautler ¶ 8; Aff. R. Lamp ¶ 5) All
24 proceeds from the sale of the real property were retained by Sacred Heart and used by
25 Sacred Heart to pay its loan to the Diocese, and to construct the new church. (Aff. R. Lamp
26 ¶ 5) Additionally, in 1990 Sacred Heart sold the old school gymnasium and property owned
by Sacred Heart. (Aff. M. Pautler ¶ 9)

In addition to holding a beneficial and equitable ownership interest in the real
property in question, Sacred Heart clearly exists as its own independent entity and has

1 always been treated as such by the Diocese. (Aff. M. Pautler ¶¶ 4, 9-11, 13-17; Aff. R.
2 Lamp ¶¶ 4-7) Consistent with its ownership of the real property, Sacred Heart, through its
3 Parishioners, has paid all insurance premiums, completed and paid all fees with tax exempt
4 forms related to the real property, and paid all local assessments. (Aff. M. Pautler ¶¶ 8, 13)
5 Sacred Heart has taken out loans from the Diocese, and used Parishioner donations, gifts
6 and capital campaigns to pay those loans back. (Aff. M. Pautler ¶ 17; Aff. R. Lamp ¶¶ 5-7)

7 The financial strength or weakness of a parish is dependent almost entirely upon its
8 Christian faithful. (Aff. M. Pautler ¶ 6) Offerings, gifts, and tithes are made by Parishioners
9 of the Parish, for the financial well being of the Parish. (Aff. M. Pautler ¶ 6; Aff. R. Lamp ¶
10 4, 6) Sacred Heart, since its inception, has raised money through weekly collections,
11 tithes, gifts, and capital campaigns. (Aff. M. Pautler ¶ 6) The fiscal management of
12 Sacred Heart is carried out independently of other Parishes of the Diocese. (Aff. M. Pautler
13 ¶ 4) It has its own rights and duties, and its own property distinct from other juridic persons.
14 (Aff. M. Pautler ¶ 4)

15 In addition to the regular contributions Sacred Heart receives from its Parishioners,
16 Sacred Heart has benefited from large gifts and bequests over the years. (Aff. M. Pautler ¶
17 17; Aff. R. Lamp ¶ 7)

18 Over the years since its inception Sacred Heart has engaged in the use of the
19 Diocese's Deposit and Loan Fund. (Aff. M. Pautler ¶ 17) Parish Money (which is traceable
20 back to Sacred Heart bank accounts and further to donations from Parishioners) is placed
21 on deposit in the Fund with the clear expectation of its return to Sacred Heart for its use.
22 (Aff. M. Pautler ¶ 17)

23 In addition to banking with the Diocese Deposit and Loan, Sacred Heart banks in the
24 public sector. Its accounts are with recognized banking institutions, held in Sacred Heart's
25 name. (Aff. M. Pautler ¶ 14)

26 Sacred Heart is truly an independent entity both legally and financially. For example,
Sacred Heart has its own TIN, maintains its own financial records, employs individuals, and
hold title to personal property in its name. (Aff. M. Pautler ¶¶ 14-16)

There has never been any confusion that money donated by parishioners was for
the benefit of Sacred Heart and not for the Diocese. (Aff. R. Lamp ¶ 3-4, 6) All fund raising

1 and donations received by Sacred Heart are the result of Parishioner efforts. (Aff. M.
2 Pautler ¶¶ 11-13; Aff. R. Lamp ¶¶ 4, 6)

3 Contrary to the Committee's conclusions, the facts demonstrate Sacred Heart is its
4 own legal entity and is the true owner of all equitable and beneficial interest of the real
5 property identified as "Sacred Heart – Medical Lake" by the Committee.

6 V.

7 STANDARDS OF REVIEW

8 A. Declaratory Judgment Standard.

9 The Committee glosses over the fact that the relief it seeks is entirely declaratory in
10 nature. A declaratory judgment action is ripe for adjudication only where an "actual
11 controversy" exists. Orix Credit Alliance, Inc. v. Wolfe, 212 F.3d 891, 896 (5th Cir. 2000).
12 "As a general rule, an actual controversy exists where 'a substantial controversy of
13 sufficient immediacy and realty [exists] between parties having adverse legal interests.'" Id.,
14 citing Middle South Energy, Inc. v. City of New Orleans, 800 F.2d 488, 490 (5th Cir.
1986).

15 Although some Bankruptcy Courts have entertained declaratory judgment actions
16 filed by trustees when the ownership interest of an asset was in dispute which the trustee
17 asserted was property of the estate on the petition date, the present case is not advanced
18 by a trustee or Debtor-in-Possession. See In re Challenge Air Int'l. Inc., 952 F.2d 384 (11th
19 Cir. 1992); In re Taylor & Campaigne, Inc., 157 B.R. 493 (Bankr. M.D. Fla. 1993); Bottom v.
20 Bottom, 176 B.R. 950 (Bankr. N.D. Fla. 1994); In re Ocean Beach Club, Inc., 79 B.R. 505
(Bankr. S.D. Fla. 1987).

21 There is no legal relationship between Sacred Heart, the Committee, or any
22 Committee members. Furthermore, there is no legal dispute between Sacred Heart and
23 the Debtor regarding the ownership interests in real property or trust relationship between
24 the Debtor and Sacred Heart. It is correctly described and defined in the Debtor's
25 Statement of Affairs in accordance with the relationship between the parties as established
26 by Canon Law and Civil Law. As such, no actual controversy between parties with adverse
legal interests exists.

1 **B. Summary Judgment Standard.**

2 The party moving for summary judgment has the burden to show that he is entitled
3 to judgment under established principles; and if he does not discharge that burden, he is
4 not entitled to judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 156, 26, L.Ed.2d 142,
5 90 S. Ct. 1598 (1970).

6 In determining whether there are any genuine issues of material fact, the Court must
7 view the evidence in the light most favorable to the nonmoving party. Summers v. A.
8 Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997). The party opposing summary
9 judgment to survive the motion need only present evidence from which a jury might return a
10 verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. Id. at
11 1039, citing Anderson v. Liberty Lobby, Inc.

12 The Committee has failed to produce any evidence to support its contention that the
13 beneficial and equitable ownership of the real property does not belong to Sacred Heart.

14 However, Sacred Heart has not only produced reasonable evidence as to a material
15 issue of fact as to its ownership interest in the real property, it has also produced
16 overwhelming evidence that Sacred Heart is the true owner of the real property in question.

17 **VI.**

18 **LEGAL ANALYSIS PREVENTING DECLARATORY RELIEF**
19 **CONCERNING REAL PROPERTY OWNERSHIP**

20 **A. Whether Applying Civil Law Or Canon Law, Sacred Heart Parish Is A**
21 **Separate And Distinct Legal Entity.**

22 The Committee has conceded that Parishes are unincorporated associations.
23 (See, Committee Statement of Undisputed Fact No. 23) The Committee's
24 acknowledgment of Sacred Heart' status as a separate legal entity from the Debtor
25 is consistent with both Civil and Canon Law.
26

1 **1. Washington Law Recognizes Sacred Heart As A Legal Entity.**

2 The Parish, as an unincorporated association, is a separate legal entity under
3 Washington law. A Parish consists of its Christian faithful. (Canon 515(1)) The Christian
4 faithful ("Parishioners") of each Parish are the residents of their local community. They are
5 residents of cities, towns, and counties within Eastern Washington, in some cases they are
6 members of sovereign Indian tribes. The Parishioners are the epitome of a voluntary group
7 pursuing a common purpose. In the case of each parish, the common purpose is the
8 fulfillment of their religious tenets.

9 An "unincorporated association" is defined as "[a] [v]oluntary group of persons,
10 without a charter, formed by mutual consent for the purpose of promoting common
11 enterprise or prosecuting common objective. An organization composed of a body of
12 persons united with a charter for the prosecution of a common enterprise." *Black's Law*
13 *Dictionary*, 1531 (6th 1991). This is a broad definition, and Washington has recognized that
14 "associations vary in their nature." *Riss v. Angel*, 131 Wn.2d 612, 635 (1997).
15 Washington's case law recognizes a variety of forms of unincorporated associations,
16 including groups of individuals of a particular religion or creed. See *Bacon v. Gardner*, 38
17 Wn.2d 299 (1951), *Church of Christ v. Carder*, 105 Wn.2d 204 (1986).

18 Unincorporated associations clearly have the ability to hold the equitable interests of
19 a trust and defend that interest in court. *Leslie v. Midgate Center, Inc.*, 72 Wn.2d 977
20 (1967). Washington has repeatedly acknowledged the legal capacity of unincorporated
21 associations to be parties to lawsuits. *Bacon v. Gardner*, 38 Wn.2d 299, 304 (1951); *State*
22 *v. Bothell*, 89 Wn.2d 862, 866 (1978); see also *Church of Christ v. Carder*, 105 Wn.2d 204,
23 206 (1986); *Riss*, 131 Wn.2d 612 (1997). By statute, unincorporated associations have the
24 capacity to appear and represent their interests in declaratory judgment actions. *RCW §§*
25 *7.24.110 - .130* (West 2005). It is well settled law that unincorporated associations have
26 the ability to represent the interests of their members in legal actions. See, *State v. Bothell*,
89 Wn.2d at 866.

 It is important to note that not a single case quoted by the Committee in support of
its assertion that each Parish is not a legal entity is from the state of Washington.
Bankruptcy Rule 7017 incorporates Rule 17(b), Fed. R. Civ. P., as follows:

1 The capacity of an individual, other than one acting in a representative
2 capacity, to sue or be sued shall be determined by the law of the individual's
3 domicile. The capacity of a corporation to sue or be sued shall be determined
4 by the law under which it was organized. In all other cases capacity to sue or
5 be sued shall be determined by the law of the state in which the district court
6 is held

7 As a matter of law, unincorporated associations can be sued under Washington law.
8 The various cases cited by the Committee have no precedential value here in Washington.
9 The Committee's argument that Sacred Heart does not have a legal existence separate
10 from the Diocese fails as a matter of law. It is also inconsistent with Committee's
11 Statement of Undisputed Fact No. 23.

12 **2. Sacred Heart Is A Separate Legal Entity Under Canon Law.**

13 The Law of the Roman Catholic Church ("Church") has been in existence since the
14 first century. Presently, the Church is governed by the 1983 Code of Canon Law. To the
15 extent the resolution of this matter requires a determination of the relationship between the
16 Debtor and Sacred Heart in their methods of governance, interaction or management,
17 compulsory deference is required to the provisions of the Code of the Canon Law which
18 govern these religious organizations under applicable law. The Supreme Court, when
19 faced with issues involving the Roman Catholic Church, has stated:

20 In the absence of fraud, collusion or arbitrariness, the decisions of proper
21 church tribunals on matters purely ecclesiastical, although affecting civil
22 rights, are accepted in litigation before the secular courts as conclusive,
23 because the parties in interest made them so by contract or otherwise. Under
24 like circumstances, effect is given in the courts to the determination of the
25 judiciary bodies established by clubs and civil associations.

26 Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16-17, ___ S.Ct. ___, 74 L.Ed. 131,
137 (1929) (citing Watson v. Jones, 13 WALL 676, 20 L.Ed. 666 (___)).

This legal principle has been clearly adopted by the Washington State Supreme
Court, when addressing real property interests involving a hierarchal church. See,
Wilkerson v. Rector, etc., St. Luke Parish, 176 Wash. 377 (1934); See also, Church of
Christ v. Carder, 105 Wn.2d 204 (1986); Southside Tabernacle v. Church of God, 32 Wash.

1 App. 814 (1982) (All applying the compulsory deference rule established in Watson to
2 disputes involving church property.)

3 In this case, the identity of the Parish, the Parishioners, the Debtor, and their
4 relationship to their property rights are defined within Canon Law. These relationships, are
5 "purely ecclesiastical, though affecting civil rights, [and] are [to be] accepted in litigation
6 before secular courts as conclusive[.]" Gonzalez, 280 U.S. at 16, ____ S.Ct. at ____, 74 L.Ed.
at 137.

7 Within the Church, besides physical persons, there are also juridic persons, that is,
8 subjects in Canon Law of obligations and rights which correspond to their nature. (Canon
9 113(2)) A juridic person is an artificial person distinct from all natural persons or material
10 goods. Like a civil law corporation, it is a legal entity which can and must be conceived
11 apart from the natural persons who constitute it, administer it, or for whose benefit it exists.
12 See L. Chiappetta, *Il Codice di Diritto Canonico: Commento Giuridico-Pastorale*, 2nd ed.
13 (Rome: Dehoniane, 1996) 1:169; Robert Kennedy, *New Commentary on the Code of*
Canon Law (Paulist Press 2000).

14 Canon Law provides that:

15 A parish is a certain community of the Christian faithful stably constituted in a
16 particular church, whose pastoral care is entrusted to a pastor as its proper
pastor under the authority of a diocesan bishop. (Canon 515(1))

17 Canon 515(3) states:

18 A legitimately erected parish possesses juridic personality by the law itself.
19 (Canon 515(3))

20 In this case, there is no dispute that Sacred Heart is a legitimately erected Parish
and a juridic person under Canon Law.

21 Canon Law is clear that property acquired by a Parish belongs to the Parish.
22 Specifically, Canon 1256 states:

23 Under the supreme authority of the Roman Pontiff, ownership of goods
24 belongs to that juridic person which has acquired them legitimately. (Canon §
1256)

1 Since its inception, the Christian faithful themselves, which constitute the Parish,
2 have acquired both real and personal property which is used by the Christian faithful in their
3 fulfillment of their religious tenets. Under Canon Law, the property was acquired by, used
4 by, improved, maintained, and owned by each Parish independently. (Canons 1257-1272)
5 The juridic person (Parish) may not be deprived of its property without consent and
6 approval. (See Canons 1281-1288 and 1291-1295)

7 **3. Committee Waived Argument on Individual Parish Standing.**

8 The Committee's decision to name and sue Sacred Heart and 81 other Parishes
9 individually is evidence of the separate legal identity of each parish. Furthermore, the
10 Committee admits that Sacred Heart is a separate unincorporated association in its
11 Statement of undisputed Facts. (CSF No. 23) The doctrine of judicial estoppel prevents a
12 party from taking divergent positions in different legal proceedings. Wagner v. Proff
Engineers in California Court, 354 F.3d 1036, 1044 (9th Cir. 2004).

13 In addition, the request for relief in the Complaint seeks substantive consolidation of
14 Sacred Heart with the Debtor. Substantive consolidation in bankruptcy terms is the
15 consolidation of a non-debtor entity with a separate debtor entity. (See Alexander, 229
16 F.3d 750 (9th Cir. 2000)) As such, the Committee has already recognized the legal identity
17 of Sacred Heart is separate and apart from the Debtor. The Committee should be
18 estopped from taking a contrary position for purposes of its Motion.

19 **4. Judicial Estoppel Does Not Apply to Sacred Heart.**

20 Sacred Heart does not dispute the definition of judicial estoppel submitted by the
21 Committee which is designed to prevent a party from taking divergent positions in different
22 legal proceedings. See the Committee's Memorandum at p. 18, citing Wagner v. Prof.
Engineers in California Gov't, 354 F.3d 1036, 1044 (9th Cir. 2004). However, the
23 Committee fails to present a full recitation of the elements required for a finding of judicial
24 estoppel, and it is in those elements that the Committee's position is revealed to be flawed.
25
26

1 The United States Supreme Court recently listed three factors that
2 courts may consider in determining whether to apply the doctrine of judicial
3 estoppel:

4 First, a party's later position must be "clearly inconsistent" with its
5 earlier position. Second, courts regularly inquire whether the party has
6 succeeded in persuading a court to accept that party's earlier position, so that
7 judicial acceptance of an inconsistent position in a later proceeding would
8 create "the perception that either the first or the second court was misled[.]"
9 Absent success in a prior proceeding, a party's later inconsistent position
10 introduces no "risk of inconsistent court determinations," and thus no threat to
judicial integrity. A third consideration is whether the party seeking to assert
an inconsistent position would derive an unfair advantage or impose an unfair
detriment on the opposing party if not estopped. In enumerating these
factors, we do not establish inflexible prerequisites or an exhaustive formula
for determining the applicability of judicial estoppel. Additional considerations
may inform the doctrine's application in specific factual contexts.

11 Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782-783 (9th Cir. 2001), citing New
12 Hampshire v. Maine, 121 S. Ct. 1808, 1815 (2001) (internal citations omitted). The
13 application of judicial estoppel is appropriate to bar litigants from making incompatible
14 statements in two different cases. Risetto v. Plumbers & Steamers Local 343, 94 F.3d 597,
15 605 (9th Cir. 1996).

16 The position taken by Sacred Heart is not inconsistent with the holding of the cases
17 cited by the Committee. In Munns v. Martin, 131 Wn. 2d 192, 196 (1977) (*en banc*), the
18 case was actually filed by the individual members of St. Patrick's Parishioners and Friends
19 of Historic Preservation. Of the seven members, six were members of the Parish. *Id.* at
20 196. The issue arose when the "St. Patrick Building Committee," a parish committee,
21 applied for a demolition permit related to St. Patrick School. This was a case of historic
22 preservation interests vs. parish building committee interests, Parishioner v. Parishioner.
23 *Id.* at 194-199. The case holding invalidated a statute that was being used by a non-
24 parishioner in an attempt to stop a building project advanced by a parish building
committee for the furtherance of the Church's fundamental right to exercise religion. The
ordinance was found to have a coercive effect on the practice of religion.

25 The second case, Miller v. Catholic Bishop of Spokane, 2004 WL 2074328 (Wash.
26 App. 2004), is an unpublished decision. As a matter of law, this opinion should not have

1 been cited. "[U]npublished opinions of the Court of Appeals will not be considered in the
2 Court of Appeals and should not be considered in the trial courts. They do not become a
3 part of the common law of Washington." State v. Fitzpatrick, 5 Wn. App. 661, 668
4 (1971)(emphasis added).

5 Regardless, in Miller, the Catholic Bishop of Spokane was sued for damages based
6 upon the plaintiff's fall from a loft opening. The Bishop defended the action based on its
7 ownership of the property, which was the Parish Hall of Sacred Heart Catholic Church in
8 Springdale, Washington. However, this is not a position that is "clearly inconsistent" with
9 the current position taken by the Diocese and the Parishes. There is no assertion or
10 indication as to the nature of the Bishop's ownership interest. In this bankruptcy case, the
11 Diocese and the Parishes assert that the Diocese holds an ownership interest in the
12 property, but holds that interest in trust for the Parishes. This is not an inconsistent
13 position. Rather, the ownership status of the Bishop in Miller was never addressed or
14 litigated. Further, the Bishop did not "succeed in persuading a court to accept that party's
15 earlier position" because the **nature** of the Bishop's ownership interest was never at issue.
16 Therefore the current position, which is consistent with the prior position, introduces no risk
17 of inconsistent court determinations.

18 **5. The Committee's Reliance Upon F.E.L. Publication, Ltd. v. The Catholic**
19 **Bishop of Chicago and Oregon Case Law is Misplaced.**

20 First, both Oregon and Illinois apply a neutral principle of law approach to church
21 property issues. When examining church property disputes, Washington applies the more
22 stringent approach of compulsory deference. Furthermore, the legislative histories and
23 governing statutes concerning corporate soles is much different than that of Washington.

24 F.E.L. Publications was a seventh circuit case which decided the issue on the legal
25 relationship between the Diocese and the Parishes within it in order to resolve a claim
26 against the diocese for tortious interference with a business relationship. There the Court
held that it was impossible for the cause of action to be based on the Diocese's directives
to the Parishes as those Parishes had no independent status, and were in fact "subsumed
under the Catholic Church." F.E.L., 754 F.2d at 221. In concluding this, the court relied

1 primarily upon Illinois case law, and in particular Haymes v. Catholic Bishop of Chicago, 41
2 Ill.2d 336 (1968), Catholic Bishop of Chicago v. Village of Palos Park, 286 Ill. 400 (1919)
3 and Galich v. Catholic Bishop of Chicago 75 Ill.App.3d 538 (1979). The case primarily
4 relied upon was Galich, however, that issue was not before the court in Galich.

5 In Galich, the Court held that the statute under which the Bishop of Chicago
6 incorporated did not create a statutory trust for the benefit of the Parishioners bringing the
7 case. Further, the Court held that any determination of the ability or inability of the Bishop
8 to demolish a church would violate the First Amendment.

9 The statute under which the case was decided was subsequently amended. As
10 amended, it includes a great deal of language indicating a legislative intent to create a trust
11 for the benefit of the religious congregation for whom the corporation is formed.

12 The other cases relied upon by the F.E.L. Court only support its conclusion by
13 inference. In Haymes, the Catholic Bishop of Chicago was named the defendant in a slip
14 and fall case at a Catholic school. While the issue was not addressed by the Court in
15 Haymes, the implication is that the Catholic school could not have been the proper
16 defendant. In Village of Palos Park, the Catholic Bishop of Chicago essentially challenged
17 the validity of a local zoning ordinance precluding the creation of a cemetery in the space
18 the Catholic Bishop wished to make one. Again, only by the inference that the Catholic
19 Bishop was the only party which could have brought the action does this case support the
20 conclusion reached by the F.E.L. Court.

21 **B. The Bankruptcy Estate Of The Diocese Does Not Have An Interest In The Real** 22 **Property At Issue.**

23 The Committee argues in its Complaint and subsequent Motion that by virtue of its
24 interpretation of law and facts that Sacred Heart' real and personal property is property of
25 the Debtor's bankruptcy estate. However, this argument is not substantiated. Section 541
26 of the Bankruptcy Code specifically excludes from the estate property to which the Debtor
holds legal title, but has no equitable or beneficial interest. (See 11 U.S.C. § 541(b), (c),
and (d))

1 The concept of trust relationships, bare legal title, and beneficial/equitable ownership
2 of property is not new to bankruptcy courts. Courts have repeatedly held that when a debtor
3 holds mere legal title to property and a non-debtor holds the beneficial or equitable
4 ownership of that property, said property is not property of the estate. See Matter of
5 Torrez, 63 BR 751, 754-55 (9th Cir. BAP 1986)(imposition of resulting trust appropriate
6 since title was only put in children's name to avoid certain restrictions in a government
7 program); Sale of Guar. Corp, 220 BR 660, 664 (9th Cir. BAP 1998)(where the transferee of
8 property does not pay the purchase price for the property, the transferee is presumed to
9 hold the property in a resulting trust for the party who paid the consideration for its
purchase).

10 The standard of inquiry under section of the Bankruptcy Code excluding from
11 property of the estate trust interests that are subject to transfer restrictions enforceable
under applicable non-bankruptcy law, normally has three parts:

- 12 (1) whether the debtor has a beneficial interest in a trust;
- 13 (2) whether there is a restriction on the transfer of that interest, and
- 14 (3) whether the restriction is enforceable under non-bankruptcy law.

15 In re Wilcox, 233 F.3d 899 (6th Cir. 2000)

16 The evaluation of each element is resolved in accordance with and through the
17 application of state law. Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d
136, 141-42 (1979).

18 Washington law clearly establishes that the Debtor holds only "bare legal title" to the
19 property in question. Sacred Heart is the true beneficial and equitable ownership of the
20 real property in dispute.

21
22 **1. Sacred Heart Parish Is The Beneficiary Of A Statutory Trust, Holding All**
23 **Equitable And Beneficial Interest In The Real Property.**

24 The corporation sole statute in Washington clearly and explicitly creates a statutory
25 trust comprised of the disputed property held for the benefit of the Church and its
parishioners. RCW Ch. 24.12. The Debtor incorporated under this chapter in 1915.

1 The legislative history is absolutely clear that the statute was enacted to create a
2 trust relationship. The bill, as introduced in the Senate by two Spokane Senators, was
3 entitled:

4 An Act providing for the organization of corporations sole, defining their
5 powers, authorizing them to transact business and hold property in trust for
6 religious denominations societies or churches.

7 S.B. 188 (Journal of Senate, 1915, p. 283) (emphasis added). After its introduction,
8 it was referred to the Senate Committee on Corporations other than Municipal. Id. After
9 review by the Committee, recommended that the bill be passed the Senate on March 6,
10 1915.

11 The bill was subsequently passed by the house on March 10, 1915, and was
12 approved by the Governor March 15, 1915.

13 The passed Senate Bill 188 became Session Law, Chapter 79. "Organizations and
14 Powers of Corporations Sole."

15 Section 3 specifically states:

16 . . . Provided, all property held in such official capacity by such bishop,
17 overseer or presiding elder, as the case may be, shall be in trust for the use,
18 purpose, benefit, and behoof of his religious denomination, society or church.

19 S.B. 188 (Session Laws, 1915, Chapter 79, p. 254)

20 As a corporation sole, the Debtor has the power to contract, sue, and be sued in
21 court. R.C.W. § 24.12.020 (West 2005). A corporation sole also has the power to deal in
22 real and personal property in the same manner as any natural person. Id. This grant of
23 legal capacity is explicitly for the benefit of the trust created under this chapter. Id. The
24 trust is comprised of all the property held by the Debtor in its official capacity. RCW §
25 24.12.030 (West 2005). Specifically the statutes state:

26 . . . All property held in such official capacity by such bishop, overseer or
presiding elder as the case may be, shall be in trust for the use, purpose,
benefit and behoof of his religious denomination, society or church.

RCW § 24.12.030 (West 2005).

Every corporation sole shall, for the purpose of the trust, have the power to
contract in the same manner and to the same extent as a natural person, and

1 may sue and be sued, and may defend in all courts and places, in all matters
2 and proceedings whatever, and shall have authority to borrow money and
3 give promissory notes therefor, and to secure the payment of the same by
4 mortgage or other lien upon property, real and personal; ...

5 RCW § 24.12.020 (West 2005)(emphasis added). This statute defines the legal
6 relationship between the Debtor, Sacred Heart, and Parishioners as a relationship of
7 trustee and beneficiary. See, RCW § 24.12.030 (West 2005). This is also consistent with
8 the norms of Canon Law which provide that each parish is a Church capable of acquiring
9 and owning real and personal property interests.

10 Despite this clear statute and governing principles of Canon Law, the Committee
11 misconstrues Washington case law explicitly recognizing the restrictions existing on
12 property impressed with a trust by dedication to religious organizations for the benefit of
13 such organizations. In Wilkeson v. Rector, etc. St. Luke's Parish, 176 Wash. 377, 386
14 (1943), cited by the Committee, the Court explicitly notes that while the alienation of the
15 property in that case was within the power of the trustee, the use of the proceeds from the
16 sale could not be diverted from the benefit of the religious purposes for which the property
17 was donated. Wilkeson, 176 Wash. at 385. ("In passing, it may be conceded that, if the
18 purpose of respondents was to divert the funds to be received from the sale of the property
19 to other than religious purposes of the Episcopal Church, the court could and would enjoin
20 them. The trustee is merely the holder of the legal title.") Even the court's explicit holding,
21 quoted only in part by the Committee, recognizes that courts will ensure that property of a
22 trust which is held to benefit a religious society cannot lawfully be diverted from the purpose
23 for which the trust is held. Id. at 386. Specifically, the court stated: "For in a trust of the
24 character involved here, where no restraint is imposed on the right to alienate, the courts
25 will not interfere further than to see to it that the proceeds from the sale of the trust property
26 are not diverted from the use for religious purposes of the faith or denomination to which
the property was dedicated." Id. (emphasis added).

Despite the Committee's assertion that "[t]he corporation sole statute's 'trust' for the
Church is no different than the trust in Wilkeson ..." (Committee's Memo, p. 11) the
Committee disregards the court's explicit statements upholding restrictions on the use of
the trust res and its proceeds, and identifying that "[t]he trustee is merely the holder of the

1 legal title.” Id. at 385. The Committee’s memorandum repeatedly fails to distinguish
2 between the rights and obligations of a trustee as the legal title holder of property, and the
3 existence of an equitable interest in the property, attempting instead, to equate the holding
4 of legal title by the Catholic Bishop of Spokane with the absence of the existence of a trust.
5 This merely evidences a lack of recognition of the distinction between legal title and an
6 equitable interest, and does not support the Committee’s argument that no trust exists.

7 The Catholic Bishop of Spokane is the trustee of the statutory trust created under
8 RCW chapter 24.12. Whether or not, as trustee, the Catholic Bishop of Spokane has the
9 power to alienate certain property of the trust, any such alienation must be for the “benefit
10 and behoof of his religious denomination, society or church.” RCW § 24.12.030 (West
11 2005). With regard to “proceeds from the sale of the trust property,” they “are not to be
12 diverted from the use for religious purposes of the faith or denomination.” Wilkerson, 176
13 Wash. at 386. The statutory trust under which the property is held reserves the beneficial
14 use of the property for Sacred Heart.

15 **2. Sacred Heart Is The Beneficiary Of An Express Trust.**

16 The recognition and observance of the civil duties of a trustee have been impressed upon
17 the Debtor since its incorporation. The Catholic Bishop of Spokane was incorporated as a
18 corporation sole under the foregoing statute on July 3, 1915. With respect to Sacred Heart
19 Parish, this trust relationship commenced with the formation of the Parish. The Washington
20 Supreme Courts has noted that statements in articles of incorporation can be sufficient to
21 create an express trust. Hoffman v. Tieton View Methodist Church, 33 Wn.2d at 727
22 (1949) (“There is no question in our minds but that all property acquired by Tieton View
23 was, under article VIII of its articles of incorporation ... held in trust for the uses of the
24 Methodist Church...”).

25 The articles of incorporation clearly express the intent of creating and maintaining a
26 trust for the benefit of the members of the Roman Catholic faith. Specifically, the articles
expressly provide:

ARTICLE III

This corporation is formed for the purpose of transacting business and **holding property in trust** for that certain religious denomination or society known as the Roman Catholic Church; to do business and contract in the same manner and to the same extent as a natural person; to borrow money and give promissory notes therefor, and to secure the payment of the same by mortgage or other lien upon property real and personal; to buy, sell, lease, mortgage, and in every way use and deal in real and personal property and to receive bequests for its own use or upon trusts.

ARTICLE IV

The incorporator of this corporation is Augustine F. Schinner, who is the duly appointed, qualified and acting Roman Catholic Bishop of the Diocese of Spokane, in the state of Washington, and who as such Bishop of the Roman Catholic Church has subscribed these Articles of Incorporation, in order to become a corporation sole, together with his successors in office by his official designation, in the manner prescribe in "An Act Providing for the Organization of Corporations Sole, Defining Their Powers, **Authorizing them to transact business and hold property in trust for religious denominations, societies or churches.**" passed by the Legislature of the State of Washington and approved by the Governor, March 15th, 1915.

ARTICLE V.

This incorporation is a religious corporation, not organized for gain and is without capital stock, **all property held by it being in trust** for the use, purpose, benefit and behoof of the Roman Catholic Church of the Diocese of Spokane, in the State of Washington.

(Articles of Incorporation, 713115, Emphasis Added)

An express trust "arises because of the expressed intent and involves a fiduciary relationship in which the trustee holds property for the benefit of a third party." Goodman v. Goodman, 128 Wn.2d 366, 372 (1995). Ninety years ago, the Bishop of Spokane clearly expressed the intent to hold property in trust for the benefit of the Parishes of the Church of the Diocese of Spokane.

A trust will be found to exist if there is a clear manifestation of an intent to create a trust; and the entire instrument, as well as its general purpose and scope, should be considered, and the instrument should be construed in light of the circumstances surrounding its execution. See, Hoffman v. Tieton View Meth. Ch., 33 Wn.2d 717, 726 (1949).

In this case, the trust instrument consists of the deed, which contains explicit language referencing the fact title is held by a "Corporation Sole." The statute governing

1 corporation soles, RCW 24.12 et seq., clearly puts others on notice that a trust relationship
2 exists.

3 Just as use and occupancy of property is sufficient to place others on notice of the
4 possessor's interest, (Miebach v. Colasurdo, 102 Wn.2d 170, 173, 177 (1984)) and the
5 failure of a spouse to record an interest in community property does not preclude that
6 spouse from defending that interest in court, (Campbell v. Sandy, 190 Wash. 528, 531
7 (1937)), the use, improvement and maintenance by Sacred Heart of property recorded in
8 the name of a corporation sole, places the world on notice of the statutory trust under which
9 it is held, and identifies the true nature of the Debtor's interest in the property. Cf. In re
10 Country Club Market, 175 B.R. 1005, 1009 (D. Minn. 1994) (finding a valid statutory trust,
11 and noting that such a finding creates no burden on creditors "[a]s opposed to contractual
12 or implied trusts, the statute is public. There is no secret agreement between" the parties.).

12 3. Statute Of Frauds Does Not Make The Express Trust In This Case 13 Defective.

14 Generally, the statute of frauds will prevent parol evidence from enforcing the terms
15 of an oral trust absent fraud or other circumstances. In re Marriage of Lutz, 74 Wn. App.
16 356, 365 (1994). An exception to the requirement for an express trust over real property is
17 a situation where a beneficiary of the trust has partially performed in accordance with the
18 trust. Diel v. Beekman, 7 Wn. App. 139, 144 (1972), overruled on other grounds, Choplin v.
19 Sanders, 100 Wn.2d 853 (1984).

20 The standard for evaluating partial performance is whether the beneficiary, with the
21 consent of the trustee:

- 21 a. Enters into possession of the land;
- 22 b. Makes improvements to the land; and
- 23 c. Changes position in reliance of the trust.

24 See, Diel at 144-145.

25 As demonstrated in the Statement of Facts in this Memorandum (Section IV),
26 Sacred Heart and its parishioners have held possession of the property to the exclusion of
all others. Sacred Heart has made all improvements to the land and maintained the

1 structures thereon. All donations have been received with the understanding that Sacred
2 Heart improved the real property to fulfill religious tenets of the Parish. Such actions were
3 taken with the understanding the Church property was property belonging to Sacred Heart.

4 **C. The Committee Ignores Statutory Restriction On Institutional Funds.**

5 The Committee's discussion of the administrative dissolution of nonprofit
6 corporations is wholly irrelevant to the enforceability of the restrictions placed on property
7 donated to Sacred Heart under Washington law. This is not an instance of an
8 administrative dissolution by the state, but a reorganization under Title 11 of the United
9 States Code. Further, Sacred Heart is subject to the Uniform Management of Institutional
10 Funds Act, RCW Chapter 24.44, which provides only two methods for the release of a
11 restriction placed on donations. RCW § 24.44.060.

12 Under Washington law, donations given with restrictions as to their use, to
13 incorporated or **unincorporated organizations operated for religious**, educational, or
14 other eleemosynary purposes, can only be used in accordance with the restrictions unless
15 (1) the donor gives written consent releasing the restriction, or (2) an order is obtained in
16 Superior Court upon a finding that the restriction is (i) obsolete, (ii) inappropriate, or (iii)
17 impracticable. R.C.W. § 24.22.060. Further, the statute requires that the Attorney General
18 be given notice and opportunity to be heard on any such matter before the Superior Court
19 makes its findings, and expressly retains the application of the judicial doctrine of *cy pres*.
20 Id. Contrary to the claim's of the Committee, Washington's Legislature and Judiciary have
21 a long and well established tradition of honoring the intention of the donors and benefactors
22 of religious organizations.

23 The facts of this case demonstrate that the real property at issue was paid for with
24 donated funds, improved, and maintained with donated funds for the benefit of Sacred
25 Heart.
26

1 **D. If The Court Concludes That A Statutory Trust Or An Express Trust Does Not**
2 **Exist, A Resulting Trust Should Be Found In Favor Of Sacred Heart.**

3 Even if the statutory and express trusts are found to be ineffective, the acquisition
4 the property in dispute clearly gives rise to a resulting trust. "It is well settled that where
5 property is taken in the name of a grantee other than the person advancing the
6 consideration, the one in whose name title is taken is a resulting trustee for the person who
7 paid the purchase price, in the absence of proof of a contrary intention." Mading v.
8 McPhaden, 50 Wn.2d 48, 53 (1957). "That grantee is presumed to hold legal title subject to
9 the equitable ownership of the person advancing the consideration." Stocker v. Stocker, 74
10 Wn. App. 1, 6 (1994) (quoting, Thor v. McDearmid, 63 Wn. App. 193, 206 (1991)).
11 "Similarly, where property is transferred to one person and the purchase price is advanced
12 by him as a loan to another, a resulting trust arises in the latter's favor." Mading, 50 Wn.2d
13 at 54. Resulting trusts are equitable in nature, and may be established by parole evidence
14 of a clear, cogent and convincing nature. Stocker, 74 Wn. App. at 6. As evidenced at
15 Section IV – Statement of Facts – all acquisitions of real and personal property, all
16 improvements, and all maintenance of the property was paid for with money directly
17 traceable to parishioners, for the benefit of Parishioners, with the clear understanding and
18 intent that it was for the benefit of Parish property. Just as in the case of Matter of Torrez,
19 63 BR 751, 754-755 (9th Cir. BAP 1986), the imposition of a resulting trust is appropriate
20 since title was placed in the name of the corporation sole with the understanding it was held
21 in trust for Sacred Heart. The Bishop never intended to actually own the property or assert
22 control over the property or improvements as exclusive owner.

21 **E. If The Diocese Is Forced To Breach Its Fiduciary Duty And Trust Relationship**
22 **owed to Sacred Heart, A Constructive Trust Must Be Imposed.**

23 The facts surrounding the nature of the relationship between the Debtor, Sacred
24 Heart, and the acquisition of the property establish a constructive trust for the benefit of
25 Sacred Heart. "A constructive trust is an equitable remedy which arises when the person
26 holding title to property has an equitable duty to convey it to another on the grounds that
they would be unjustly enriched if permitted to retain it." Lakewood v. Pierce County, 144

1 Wn.2d 118, 126 (2001). A constructive trust will be “imposed when there is clear, cogent
2 and convincing evidence of the basis for impressing the trust.” Id. To establish a
3 constructive trust, a “party must show the trust arose from the relationship of the parties
4 involved, and that the property justly belongs to that party.” Id. at 129. Here, the intent of
5 the parties was to create valid statutory and express trusts, the beneficial use of the
6 property was at all times held reserved by and for Sacred Heart. Not only is there clear,
7 cogent and convincing evidence for the imposition of a trust, but for the Court to hold that
8 the property in dispute belongs to the Debtor would unjustly enrich the Debtor to the
9 detriment of Sacred Heart who has relied on its ownership of the property since the parish
10 was founded.

11 **F. The Committee’s Catch All Argument Of “Alter Ego” Fails As A Matter Of Law
12 And Fact.**

13 The “Alter Ego” theory advanced by the Committee is merely a disguised attempt to
14 circumvent legal deficiencies in its third claim for relief of substantive consolidation. In this
15 case, the Committee is asking the Court to rule that Sacred Heart is liable for the debts of
16 the Debtor, a corporation sole, even though Sacred Heart is a separate legal entity and is
17 clearly not a “shareholder” of the Debtor.

18 When Washington Courts invoke “piercing the corporate veil”, they have applied the
19 “doctrine of corporate disregard” based upon two elements:

- 20 a. “The corporate form must be intentionally used to violate or evade a duty,”
21 and
22 b. “Disregard must be necessary and required to prevent unjustified loss to the
23 injured party.”

24 See, Meisel v. M & N Modern Hydraulic Press Co., 97 Wn.2d 403, 410, 645 P.2d
25 689 (1982)

26 The first factor requires a showing of abuse of the corporate form, typically involving
fraud, misrepresentation, or other action **by the corporation that harms the creditor and
benefits the shareholder.** The second factor requires that the harm must actually occur.

1 In this case, the Committee has neither plead nor demonstrated any facts to support both
2 requirements of an "Alter Ego Claim."

3 The undisputed facts offered by Sacred Heart demonstrate a claim of "Alter Ego" is
4 without merit. (See Statement of Facts, Section IV)

5 **1. The Committee Attempts To Circumvent Statutory Prohibitions Against**
6 **Substantive Consolidation Of A Not "Moneyed" Entity.**

7 The Committee's Complaint, in its third cause of action, seeks a declaratory order for
8 substantive consolidation "all Diocese Related Entities." The Committee's Motion for
9 Summary Judgment now seeks a declaratory order under a theory of "Alter Ego." Such a
10 legal theory is nothing more than a thinly veiled attempt to place Sacred Heart and other
11 non-debtor/non-moneyed religious entities into an involuntary bankruptcy. Relief which is
12 forbidden by the Code. See, 11 U.S.C. § 303(a) and corresponding legislative history.
House Report No. 95-595, 95th Cong., 1st Sess 321 (1977).

13 The Bankruptcy Code clearly recognizes that not all debtors are the same. And
14 while Chapter 11 and its provisions do not generally distinguish between for-profit, non-
15 profit, and religious organizations for the purposes of reorganization, that is not to say that
16 a distinction does not exist and should not or cannot be made. For example, under the
17 Bankruptcy Code non-profit corporations are treated more favorably than for-profit
18 organizations. See, e.g., 11 U.S.C. § 303(a) (excluding non-profit organizations from
19 involuntary bankruptcy); 11 U.S.C. § 1112(c) (forbidding a court from converting a case
20 filed by a non-profit from Chapter 11 to Chapter 7 without consent). Congress has
21 recognized that religious organizations present unique bankruptcy issues because
22 government regulation of religion implicates First Amendment rights. For example, the
23 Bankruptcy Code has been modified by Congress to protect free exercise of religion to
24 prevent a trustee from avoiding a debtor's donation given to a religious or charitable
organization. See Religious Liberty and Charitable Donation Protection Act of 1998, Pub.
L. No. 105-183, 112 Stat. 517 (1998).

25 Substantive consolidation has no express statutory basis, but rather, is a "product of
26 judicial gloss." In re Augie/Restiro Bakery Co. Lt., 860 F.2d 515, 518 (2nd Cir. 1988).

1 Substantive consolidation results in pooling the assets of, and claims against, the two
2 entities, satisfying liabilities from the resultant common fund; eliminating inter company
3 claims; and combining creditors of the two companies for purposes of voting on
4 reorganization plans. In re Bonham, 229 F.3d 750, 764 (9th Cir. 2000).

5 In the present case, even if the Committee could get around the statutory
6 prohibitions, the Committee would have to demonstrate 1) that the Committee or its
7 members dealt with Sacred Heart Parish and the Debtor as a single economic unit and did
8 not rely on the separate credit of each of the entities; or that the operations of the Debtor
9 and Sacred Heart Parish were **excessively** entangled with the Debtor's affairs to the extent
10 that consolidation will benefit all creditors. See In re Bonham, 229 F.3d 750, 766 (9th Cir.).

11 The newly surfaced "Alter Ego" theory is nothing more than a recognition that
12 Committee's third cause of action has no application in this case.

13 **G. Subjecting The Parish To Declaratory Relief of this Nature Violates First**
14 **Amendment Rights Of Free Exercise And The Religious Freedom Restoration**
15 **Act.**

16 The exercise of religion includes the "right to believe and profess whatever religious
17 doctrine one desires" and prevents the government from "lendi[ng] its power to one side or
18 another in controversies over religious authority or dogma." See Smith, 494 U.S. at 877
19 (citations omitted). To protect the exercise of religion, the Supreme Court has held that if
20 the government "substantially burdens" a person's exercise of religion, and the government
21 does not demonstrate that it has a "compelling government interest" to justify the religious
22 burden, then the government intrusion into a person's free exercise of religion has been
23 violated. See Sherbert v. Verner, 374 U.S. 398, 406 (1963). However, this Court later
24 limited Sherbert by holding that "the right of free exercise does not relieve an individual of
25 the obligation to comply with a 'valid and neutral law of general applicability . . .'" See
26 Smith, 494 U.S. at 879 (citations omitted). Public opposition to the Smith holding was
immediate and forceful. Congress enacted the Religious Freedom Restoration Act, 42
U.S.C. § 2000bb-1 (1993)(hereinafter, RFRA), "to restore the compelling interest test as set
forth in Sherbert," and "to guarantee its application in all cases where free exercise of

1 religion is substantially burdened," including cases in which the law at issue was of "general
2 applicability." See 42 U.S.C. § 2000bb(b)(1), (2). In Boerne v. Flores, 521 U.S. 507
3 (1997), the Supreme Court declared RFRA unconstitutional as applied to state actions
4 because Congress had exceeded the scope of its power under Section 5 of the Fourteenth
5 Amendment in enacting the law. See Boerne, 521 U.S. at 527 (RFRA "intruded into an
6 area reserved by the Constitution to the States"). However, RFRA continues to be
constitutional as applied to federal law.

7 Under RFRA, a neutral law of general applicability is an unconstitutional
8 infringement of a person's free exercise rights if the following is true: (1) the law
9 substantially burdens a person's exercise of religion; (2) the government cannot justify the
10 law with a compelling government interest; and (3) there are no less restrictive means of
furthering the government's compelling interest. 42 U.S.C. § 2000bb-1(a), (b).

11 Two unique circumstances arise would occur if the Court were to dictate the
12 ownership and use of Parish property: (1) a religious leader will have been replaced by a
13 government official as the head of a religious organization, resulting in comprehensive
14 government surveillance of religion; and (2) a government official will be in an
15 unprecedented position of decision making power over a church/Parish, a position
16 traditionally given only to a spiritually mandated leader, the Pastor of the Parish, resulting in
17 the appearance of government endorsement of religion for the benefit of a creditor's
committee.

18 Sacred Heart' economic interests cannot be separated from its spiritual interest –
19 any economic decision the Court makes regarding use or ownership of property inevitably
20 has direct and significant religious consequences. Thus, the Court will become hopelessly
21 entangled with religious policy of the Catholic Church. The effect of Sacred Heart' spiritual
22 mission is that every financial decision it makes is driven by religious objectives toward
23 religious ends in accordance with Canon Law. This creates an irreconcilable church versus
24 state conflict between a non-debtor, a creditors committee, and the Court. By effectively
25 forcing a Parish into bankruptcy by way of declaratory relief, the government is changing
26 the essential structure of Sacred Heart under Canon Law. Since the Canon directs the

1 religious vision and thus the financial objectives of Sacred Heart, such a change would
2 essentially allow government to determine who benefits from Sacred Heart' mission.

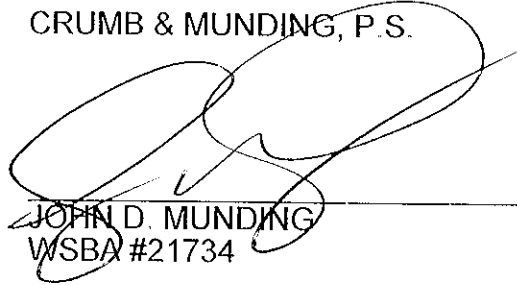
3
4 **VII.**

5 **CONCLUSION**

6 As a matter of law, the Committee has not established a case in controversy with
7 Sacred Heart that would permit the declaratory relief requested. Even if the Court were to
8 consider the pending motion for summary judgment based upon the Committee's factual
9 theory, the Committee's motion fails as the Committee has failed to eliminate material
10 questions of fact as to Sacred Heart' ownership interest in the real property, including
11 furnishing all consideration for purchase, improvements, and maintenance.

12 DATED this 26th day of May, 2005.

13 CRUMB & MUNDING, P.S.

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